

CHAPTER 4

DISCIPLINE AND PROFESSIONAL CONDUCT OF LICENSEES

[Prior to 6/1/88, see Engineering and Land Surveying Examiners, Board of[390] Ch 4]
[Prior to 11/27/91, for disciplinary rules see 193C—1.10(114) to 193C—1.29(114)]
[Rules 4.7(542B) to 4.28(542B) renumbered as 4.8(542B) to 4.29(542B) IAC 11/23/94]

193C—4.1(542B) General statement. Protection of the life, health or property of the people in Iowa requires that the board deal with cases involving malpractice or violation of Iowa Code chapter 542B.

193C—4.2(17A) Definitions.

“Issuance” means the date of mailing of a decision or order or the date of delivery if service is by other means unless another date is specified in the order.

“Proposed decision” means the presiding officer’s recommended findings of fact, conclusions of law, decision, and order on a contested case in which the board did not preside.

193C—4.3(542B) Reprimands, probation, license suspension or license revocation. Acts or omissions on the part of a licensee that are grounds for a reprimand, period of probation, license suspension or license revocation are as follows:

4.3(1) Acts or offenses defined in Iowa Code section 542B.21.

4.3(2) Acts or omissions which constitute negligence or carelessness that licensees must report to the board as defined in rule 4.4(542B).

4.3(3) Unethical conduct including, but not limited to, violation of the code of professional conduct in rule 4.8(542B).

4.3(4) Failure to respond within 30 days to written communications from the board and to make available any relevant records with respect to an inquiry or complaint about the licensee’s unprofessional conduct. The period of 30 days shall commence on the date when such communication was sent from the board by registered or certified mail with return receipt requested to the address appearing in the last licensure.

4.3(5) Failure to comply with a warning from the board with respect to licensee behavior.

This rule is intended to implement Iowa Code section 542B.21.

193C—4.4(542B) Reporting of acts or omissions. Licensees shall report acts or omissions by a licensee which constitute negligence or carelessness. For the purposes of this rule, negligence or carelessness shall mean demonstrated unreasonable lack of skill in the performance of engineering or land surveying services by failure of a licensee to maintain a reasonable standard of care in the licensee’s practice of engineering or land surveying. In the evaluation of reported acts or omissions, the board shall determine if the engineer or land surveyor has applied learning, skill and ability in a manner consistent with the standards of the professions ordinarily possessed and practiced in the same profession at the same time. Standards referred to in the immediately preceding sentence shall include any minimum standards adopted by this board and any standards adopted by recognized national or state engineering or land surveying organizations.

193C—4.5(542B) Peer review committees. The board may appoint a peer review committee for the investigation of a complaint about the acts or omissions of one or more licensees.

4.5(1) Membership. A committee shall consist of one or more licensed engineers or licensed land surveyors or both, as determined by the board, who are selected for their knowledge and experience in the type of engineering or land surveying involved in the complaint. The following are ineligible for membership:

- a. Members of the engineering and land surveying examining board.
- b. Relatives of the respondent or complainant.

c. Individuals employed by the same firm or governmental unit as the respondent or complainant.

4.5(2) Authority. The committee's investigation may include activities such as interviewing the complainant, the respondent, individuals with knowledge of the alleged violation, and individuals with knowledge of the respondent's practice in the community; gathering documents; site visits; and independent analyses as deemed necessary.

The committee may not hire legal counsel, investigators, secretarial help or any other assistance without written authorization from the board.

4.5(3) Compensation. Committee members may receive per diem compensation equal to that received by board members for performing board duties. Committee members may be paid reasonable and necessary expenses that are incurred for travel, meals and lodging while performing committee duties within established budget limitations.

4.5(4) Reports. Each peer review committee shall submit a written report to the board within a reasonable period of time. The report shall recommend dismissal of the complaint, further investigation or disciplinary proceedings. If further investigation or disciplinary proceedings are recommended, supporting information shall be submitted to the secretary.

The peer review committee may be discharged at the pleasure of the board. The board may dismiss individual members of a committee or add new members at any time. Committee members may be required to testify in the event of formal disciplinary proceedings.

4.5(5) Investigator. In addition to or as an alternative to a peer review committee, the board may hire one or more investigators.

193C—4.6(542B) Disputes between licensees and clients. Reports from the insurance commissioner or other agencies on the results of judgments or settlements of disputes arising from malpractice claims or other actions between professional engineers or land surveyors and their clients may be referred to an investigator or peer review committee. The investigator or peer review committee shall investigate the report for violation of the statutes or rules governing the practice or conduct of the licensee. The investigator or peer review committee shall advise the board of any probable violations.

193C—4.7(542B) Practice of engineering or land surveying by firms. A firm shall not directly or by implication offer professional engineering services to the public unless it is owned or managed by, or regularly employs, one or more licensed professional engineers who directly control and personally supervise all professional engineering work performed by the firm.

A firm shall not directly or by implication offer land surveying services to the public unless it is owned or managed by, or regularly employs, one or more licensed land surveyors who directly control and personally supervise all land surveying work performed by the firm.

A firm may not satisfy these requirements by hiring a licensed professional engineer or land surveyor on an as-needed, occasional, or consulting basis, whether an employee or independent contractor.

"To offer" shall mean to advertise in any medium, or to infer in writing or orally that these services are being performed by owners or permanent employees of that firm. Nothing in this rule is intended to prevent a firm from truthfully offering services as a project manager, administrator, or coordinator of a multidisciplinary project.

For purposes of this rule, the term "firm" includes regular corporations, professional corporations, registered limited liability partnerships, partnerships, limited liability companies, private practitioners employing others, persons or entities using fictitious or assumed names, or other business entities.

This rule is intended to implement Iowa Code section 542B.26.

193C—4.8(542B) Code of professional conduct. In order to establish and maintain a high standard of integrity, skills and practice in the professions of engineering and land surveying, and to safeguard the life, health, or property of the public, the following code of professional conduct shall be binding upon every person holding a certificate of licensure as a professional engineer or land surveyor in this state.

The code of professional conduct as promulgated herein is an exercise of the police power vested in the board by virtue of the Acts of the legislature, and as such the board is authorized to establish conduct, policy, and practices.

All persons licensed under Iowa Code chapter 542B are charged with having knowledge of the existence of this code of professional conduct and shall be deemed to be familiar with its several provisions and to understand them. Such knowledge shall encompass the understanding that the practices of engineering and land surveying are a privilege, as opposed to a right, and the licensee shall be forthright and candid in statements or written response to the board or its representatives on matters pertaining to professional conduct.

4.8(1) *Responsibility to the public.* Licensees shall at all times conduct their professional practices in a manner that will protect life, health and property and enhance the public welfare. If their professional judgment is overruled under circumstances where life, health and property of the public are endangered, they shall inform their employer or client of the possible consequences, shall notify such other proper authority as may be appropriate, and shall withdraw from further services on the project.

Licensees shall neither approve nor certify engineering or land surveying documents that may be harmful to the public life, health and property and that are not in conformity with accepted engineering or land surveying standards.

4.8(2) *Competency for assignments.* Licensees shall undertake to perform engineering or land surveying assignments only when qualified by education and experience in the specific technical field of professional engineering or land surveying involved. Licensees shall engage or advise engaging experts and specialists whenever the client or employer's interests are best served by such service.

Licensees may accept an assignment on a project requiring education or experience outside their field of competence, but only to the extent that their services are restricted to those phases of the project in which they are qualified. All other phases of such projects shall be under the responsible charge of qualified associates, consultants or employees holding a valid Iowa license.

4.8(3) *Truth in reports and testimony.* Licensees, when serving as expert or technical witnesses before any court, commission, or other tribunal, shall express an opinion only when it is founded upon adequate knowledge of the facts in issue, upon a background of technical competence in the subject matter, and upon honest conviction of the accuracy and propriety of their testimony. Under these circumstances, should knowledge be inadequate, the licensee must so state.

Licensees shall be objective and truthful in all professional reports, statements or testimony. All relevant and pertinent information shall be included in such reports, statements or testimony.

4.8(4) *Conflicts of interest.* Licensees shall not issue statements, criticisms or arguments on engineering or land surveying matters connected with public policy which are influenced or paid for by an interested party, or parties, unless they have prefaced their comments by explicitly identifying themselves, by disclosing the identities of the party or parties on whose behalf they are speaking, and by revealing the existence of any pecuniary interest.

Licensees shall avoid all known conflicts of interest with their employers or clients and, when unforeseen conflicts arise, shall promptly inform their employers or clients of any business association, interest, or circumstances which could influence judgment or the quality of services.

Licensees shall not accept compensation, financial or otherwise, from more than one party for services on the same project, unless the circumstances are fully disclosed to, and agreed to, by all interested parties.

Licensees shall act in professional matters for each employer or client as faithful agents or trustees and shall maintain full confidentiality on all matters in which the welfare of the public is not endangered.

4.8(5) *Unethical or illegal conduct.* Licensees shall not pay or offer to pay, either directly or indirectly, any commission, political contribution, gift, or other consideration in order to secure work, exclusive of securing positions through employment agencies.

Licensees, as employers, shall refrain from engaging in any discriminatory practice prohibited by law and shall, in the conduct of their business, employ personnel upon the basis of merit.

Licensees shall not solicit or accept gratuities, directly or indirectly, from contractors, their agents, or other parties dealing with their clients or employers in connection with work for which they are responsible.

Licensees shall not solicit or accept an engineering or land surveying contract from a governmental body when a principal or officer of their organization serves as a member.

Licensees shall not associate with or permit the use of their names or firms in a business venture by any person or firm which they know, or have reason to believe, is engaging in business or professional practice of a fraudulent or dishonest nature.

Licensees shall not use association with nonengineers, corporations or partnerships as “cloaks” for unethical acts. Licensees shall not violate any local, state or federal criminal law in the conduct of professional practice.

Licensees shall not violate licensure laws of any state or territory.

Licensees shall not represent themselves as licensed land surveyors or professional engineers and shall not place firm name, logo or title block on a Real Property Inspection Report.

4.8(6) *Standards of integrity.* Licensees shall answer all questions of a duly constituted investigative body of the state of Iowa concerning alleged violations by another person or firm.

Licensees shall admit and accept their own errors when proven wrong and shall refrain from distorting or altering the facts to justify their own decisions.

If licensees have knowledge or reason to believe that another person or firm may be in violation of any Iowa regulations regarding conduct of professional engineering or land surveying practice, they shall present such information to the engineering and land surveying examining board in writing and shall cooperate with the board in furnishing further information or assistance required by the board.

Licensees shall not assist in the application of an individual known by the licensee to be unqualified for licensure by reason of education, experience or character.

193C—4.9(542B) Complaints and investigations.

4.9(1) *Complaints.* The board shall, upon receipt of a complaint in writing, or may upon its own motion, pursuant to other evidence received by the board, review and investigate alleged acts or omissions which reasonably constitute cause under applicable law or administrative rule for licensee discipline.

4.9(2) *Form and content.* A written complaint should include the following facts:

- a. The full name, address, and telephone number of complainant.
- b. The full name, address, and telephone number of respondent.
- c. A statement of the facts concerning the alleged acts or omissions.
- d. Identification of the statutes and administrative rules allegedly violated.
- e. Evidentiary supporting documentation.

The written complaint may be delivered personally or by mail to the secretary of the board. The current office address is 1918 S.E. Hulsizer, Ankeny, Iowa 50021.

4.9(3) *Investigation of allegations.* In order to determine if probable cause exists for a hearing on the complaint, the board may cause an investigation to be made into the allegations of the complaint. It may refer the complaint to a peer review committee or an investigator for investigation, review and report to the board.

4.9(4) *Informal discussion.* If the board considers it advisable, or if requested by the affected licensee, the board may grant the licensee an opportunity to appear before the board or a committee of the board for a voluntary informal discussion of the facts and circumstances of an alleged violation. The licensee may be represented by legal counsel at the informal discussion. The licensee is not required to attend the informal discussion. By electing to attend, the licensee waives the right to seek disqualification, based upon personal investigation of a board member or staff, from participating in making a contested case decision or acting as a presiding officer in a later contested case proceeding. Because an informal discussion constitutes a part of the board's investigation of a pending disciplinary case, the facts discussed at the informal discussion may be considered by the board in the event the matter proceeds to a contested case hearing and those facts are independently introduced into evidence. The board may seek a consent order at the time of the informal discussion. If the parties agree to a consent order, a statement of charges shall be filed simultaneously with the consent order.

193C—4.10(542B) *Informal settlement.* A contested case may be resolved by informal settlement. Negotiation of an informal settlement may be initiated by the assistant attorney general, the respondent, or the board. The board may designate a board member with authority to negotiate on behalf of the board. Negotiation shall be limited to the parties and the board's designee until presentation of a final, written form to the full board for approval.

4.10(1) *Informal settlement—waiver of notice and opportunity to be heard.* Consent to negotiation by the respondent constitutes a waiver of notice and opportunity to be heard pursuant to Iowa Code section 17A.17 during informal settlement negotiation. Thereafter, the prosecuting attorney is authorized to discuss informal settlement with the board's designee.

4.10(2) *Informal settlement—board approval.* All informal settlements are subject to approval of a majority of the full board. No informal settlement shall be presented to the board for approval except in final, written form executed by the respondent. If the board fails to approve the informal settlement, it shall be of no force or effect to either party.

4.10(3) *Informal settlement—disqualification of designee.* A board member who is designated to act in negotiation of an informal settlement is not disqualified from participating in the adjudication of the contested case.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

193C—4.11(542B) *Ruling on the initial inquiry.*

4.11(1) *Dismissal.* If a determination is made by the board that a complaint is without grounds or merit, the complaint shall be dismissed. A letter of explanation concerning the decision of the board shall be sent to the respondent and the complainant.

4.11(2) *Requirement of further inquiry.* If determination is made by the board to order further inquiry, the complaint and initial recommendations shall be provided to the investigator(s) along with a statement specifying the information deemed necessary.

4.11(3) *Acceptance of the case.* If a determination is made by the board to initiate disciplinary action, the board may enter into an informal settlement or recommend formal disciplinary proceedings.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

193C—4.12(542B,272C) Statement of charges. The statement of charges shall set forth the acts or omissions with which the respondent is charged including the statute(s) and rule(s) which are alleged to have been violated, and shall be in sufficient detail to enable the preparation of the respondent's defense.

193C—4.13(17A) Time requirements.

4.13(1) Time shall be computed as provided in Iowa Code subsection 4.1(34).

4.13(2) For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

193C—4.14(17A) Requests for contested case proceeding. Any person claiming an entitlement to a contested case proceeding shall file a written request for such a proceeding within the time specified by the particular rules or statutes governing the subject matter or, in the absence of such law, the time specified in the board action in question.

The request for a contested case proceeding shall state the name and address of the requester; identify the specific board action which is disputed and, where the requester is represented by counsel, identify the provisions of law or precedent requiring or authorizing the holding of a contested case proceeding in the particular circumstances involved, and include a short and plain statement of the issues of material fact in dispute.

193C—4.15(542B,272C) Notice of hearing. The board's notice of hearing shall fix the time and place for hearing and shall contain those items specified in Iowa Code section 17A.12(2). The notice shall also contain the following:

1. A statement of the time, place, and nature of the hearing;
2. A statement of the legal authority and jurisdiction under which the hearing is to be held;
3. A reference to the particular sections of the statutes and rules involved;
4. A short and plain statement of the matters asserted. If the board or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished;
5. Identification of all parties including the name, address and telephone number of the person who will act as advocate for the board or the state and identification of parties' counsel where known;
6. Reference to the procedural rules governing conduct of the contested case proceeding;
7. Reference to the procedural rules governing informal settlement;
8. Identification of the presiding officer, if known. If not known, a description of who will serve as presiding officer (i.e., the board, a panel of the board, or an administrative law judge from the department of inspections and appeals); and
9. Notification of the time period in which a party may request, pursuant to 1998 Iowa Acts, chapter 1202, section 15(1), and rule 4.18(17A), that the presiding officer be an administrative law judge.
10. A statement requiring the respondent to submit an answer of the type specified in rule 4.16(542B,272C) within 20 days after receipt of the notice of hearing.

193C—4.16(542B,272C) Form of answer. The answer shall contain the following information:

1. The name, address and telephone number of the respondent.
2. Specific statements regarding any or all allegations in the complaint which shall be in the form of admissions, denials, explanations, remarks or statements of mitigating circumstances.
3. Any additional facts or information which the respondent deems relevant to the complaint and which may be of assistance in the ultimate determination of the case.

193C—4.17(542B,272C) Legal representation. Every statement of charges and notice of hearing prepared by the board shall be reviewed and approved by the office of the attorney general which shall be responsible for the legal representation of the public interest in all proceedings before the board. The assistant attorney general assigned to prosecute a contested case before the board shall not represent the board in that case but shall represent the public interest.

193C—4.18(17A) Presiding officer.

4.18(1) Any party who wishes to request that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the department of inspections and appeals must file a written request within 20 days after service of a notice of hearing which identifies or describes the presiding officer as the board or a panel of the board.

4.18(2) The board may deny the request only upon a finding that one or more of the following apply:

- a. Neither the board nor any officer of the board under whose authority the contested case is to take place is a named party to the proceeding or a real party in interest to that proceeding.
- b. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.
- c. The case involves a disciplinary hearing to be held by the board pursuant to Iowa Code section 272C.6.
- d. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.
- e. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.
- f. Funds are unavailable to pay the costs of an administrative law judge and an interboard appeal.
- g. The request was not timely filed.
- h. The request is not consistent with a specified statute.

4.18(3) The board shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed.

4.18(4) Except as provided otherwise by another provision of law, all rulings by an administrative law judge acting as presiding officer are subject to appeal to the board. A party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.

4.18(5) Unless otherwise provided by law, agency heads and members of multimembered agency heads, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the provisions of this chapter which apply to presiding officers.

193C—4.19(17A) Waiver of procedures. Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the board in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

193C—4.20(17A) Telephone proceedings. The presiding officer may resolve preliminary procedural motions by telephone conference in which all parties have an opportunity to participate. Other telephone proceedings may be held with the consent of all parties. The presiding officer will determine the location of the parties and witnesses for telephone hearings. The convenience of the witnesses or parties, as well as the nature of the case, will be considered when location is chosen.

193C—4.21(17A) Disqualification.

4.21(1) A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

- a. Has a personal bias or prejudice concerning a party or a representative of a party;
- b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties;
- c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties;
- d. Has acted as counsel to any person who is a private party to that proceeding within the past two years;
- e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case;
- f. Has a spouse or relative within the third degree of relationship that: (1) is a party to the case, or an officer, director or trustee of a party; (2) is a lawyer in the case; (3) is known to have an interest that could be substantially affected by the outcome of the case; or (4) is likely to be a material witness in the case; or
- g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

4.21(2) The term “personally investigated” means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term “personally investigated” does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person’s investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other board functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17 as amended by 1998 Iowa Acts, chapter 1202, section 19, and subrule 4.38(9).

4.21(3) In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit the relevant information for the record by affidavit and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

4.21(4) If a party asserts disqualification on any appropriate ground, including those listed in sub-rule 4.21(1), the party shall file a motion supported by an affidavit pursuant to 1998 Iowa Acts, chapter 1202, section 19(7). The motion must be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record.

If the presiding officer determines that disqualification is appropriate, the presiding officer or other person shall withdraw. If the presiding officer determines that withdrawal is not required, the presiding officer shall enter an order to that effect. A party asserting disqualification may seek an interlocutory appeal under rule 4.40(17A) and seek a stay under rule 4.43(17A).

193C—4.22(17A) Consolidation—severance.

4.22(1) Consolidation. The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where: (a) the matters at issue involve common parties or common questions of fact or law; (b) consolidation would expedite and simplify consideration of the issues involved; and (c) consolidation would not adversely affect the rights of any of the parties to those proceedings.

4.22(2) Severance. The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

193C—4.23(17A) Amendments. Any notice of hearing or statement of charges may be amended before a responsive pleading has been filed. Amendments to pleadings after a responsive pleading has been filed and to an answer may be allowed with the consent of the other parties or in the discretion of the presiding officer who may impose terms or grant a continuance.

193C—4.24(17A) Service and filing of pleadings and other papers.

4.24(1) When service required. Except where otherwise provided by law, every pleading, motion, document, or other paper filed in a contested case proceeding and every paper relating to discovery in such a proceeding shall be served upon each of the parties of record to the proceeding, including the person designated as advocate or prosecutor for the state or the board, simultaneously with their filing. Except for the original notice of hearing and an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

4.24(2) Service—how made. Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order.

4.24(3) Filing—when required. After the notice of hearing, all pleadings, motions, documents or other papers in a contested case proceeding shall be filed with the board. All pleadings, motions, documents or other papers that are required to be served upon a party shall be filed simultaneously with the board.

4.24(4) Filing—when made. Except where otherwise provided by law, a document is deemed filed at the time it is delivered to the board, delivered to an established courier service for immediate delivery to that office, or mailed by first-class mail or state interoffice mail to that office, so long as there is proof of mailing.

4.24(5) *Proof of mailing.* Proof of mailing includes either: a legible United States Postal Service postmark on the envelope, a certificate of service, a notarized affidavit, or a certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Engineering and Land Surveying Examining Board and to the names and addresses of the parties listed below by depositing the same in (a United States post office mailbox with correct postage properly affixed or state interoffice mail).

(Date)

(Signature)

193C—4.25(17A) Discovery.

4.25(1) Discovery procedures applicable in civil actions are applicable in contested cases. Unless lengthened or shortened by these rules or by order of the presiding officer, time periods for compliance with discovery shall be as provided in the Iowa Rules of Civil Procedure.

4.25(2) Any motion relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is shortened as provided in subrule 4.25(1). The presiding officer may rule on the basis of the written motion and any response, or may order argument on the motion.

4.25(3) Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

193C—4.26(17A) Subpoenas. In connection with the investigation of a complaint, the board is authorized by law to subpoena books, papers, records, and any other real evidence, whether or not privileged or confidential under law, to help it determine whether it should institute a contested case proceeding (disciplinary hearing). After service of the notice of hearing under rule 4.15(542B,272C), the following procedures are available to the parties in order to obtain relevant and material evidence.

4.26(1) Board subpoenas for books, papers, records, and other real evidence will be issued to a party upon request. Subpoenas for witnesses may also be obtained. The executive secretary shall issue all subpoenas for both parties upon request. The request, which may be verbal or written, must specify the documents sought to be obtained and the names of the witnesses whose testimony is sought.

4.26(2) The presiding officer may quash or modify a subpoena for any lawful reason upon motion in accordance with the Iowa Rules of Civil Procedure. A motion to quash or modify a subpoena shall be set for argument promptly.

4.26(3) In the event of a refusal to obey a subpoena, either party or the board may petition the district court for its enforcement. Upon proper showing, the district court shall order the person to obey the subpoena and, if the person fails to obey the order of the court, the person may be found guilty of contempt of court.

193C—4.27(17A) Motions.

4.27(1) No technical form for motions is required. However, prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

4.27(2) Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the board or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

4.27(3) The presiding officer may schedule oral argument on any motion.

4.27(4) Motions pertaining to the hearing, except motions for summary judgment, must be filed and served at least five days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the board or an order of the presiding officer.

4.27(5) Motions for summary judgment shall comply with the requirements of Iowa Rule of Civil Procedure 237 and shall be subject to disposition according to the requirements of that rule to the extent such requirements are not inconsistent with the provisions of this rule or any other provision of law governing the procedure in contested cases.

Motions for summary judgment must be filed and served at least 20 days prior to the scheduled hearing date, or other time period determined by the presiding officer. Any party resisting the motion shall file and serve a resistance within 10 days, unless otherwise ordered by the presiding officer, from the date a copy of the motion was served. The time fixed for hearing or nonoral submission shall be not less than 15 days after the filing of the motion, unless a shorter time is ordered by the presiding officer. A summary judgment order rendered on all issues in a contested case is subject to rehearing pursuant to rule 4.42(17A) and appeal pursuant to rule 4.41(17A).

193C—4.28(17A) Prehearing conference.

4.28(1) Any party may request a prehearing conference. A written request for prehearing conference or an order for prehearing conference on the presiding officer's own motion shall be filed not less than seven days prior to the hearing date. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

Written notice of the prehearing conference shall be given by the board to all parties. For good cause the presiding officer may permit variances from this rule.

4.28(2) Each party shall bring to the prehearing conference:

a. A final list of the witnesses who the party anticipates will testify at hearing. Witnesses not listed may be excluded from testifying unless there was good cause for the failure to include their names; and

b. A final list of exhibits which the party anticipates will be introduced at hearing. Exhibits other than rebuttal exhibits that are not listed may be excluded from admission into evidence unless there was good cause for the failure to include them.

c. Witness or exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the presiding officer at the prehearing conference. Any such amendments must be served on all parties.

4.28(3) In addition to the requirements of subrule 4.28(2), the parties at a prehearing conference may:

a. Enter into stipulations of law or fact;

b. Enter into stipulations on the admissibility of exhibits;

c. Identify matters which the parties intend to request be officially noticed;

d. Enter into stipulations for waiver of any provision of law; and

e. Consider any additional matters which will expedite the hearing.

4.28(4) Prehearing conferences shall be conducted by telephone unless otherwise ordered. Parties shall exchange and receive witness and exhibit lists in advance of a telephone prehearing conference.

193C—4.29(17A) Continuances. Unless otherwise provided, applications for continuances shall be made to the presiding officer.

4.29(1) A written application for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's representative.

An oral application for a continuance may be made if the presiding officer waives the requirement for a written motion. However, a party making such an oral application for a continuance must confirm that request by written application within five days after the oral request unless that requirement is waived by the presiding officer. No application for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The board may waive notice of such requests for a particular case or an entire class of cases.

4.29(2) In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlement;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirements;
- g. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- h. The timeliness of the request; and
- i. Other relevant factors.

The presiding officer may require documentation of any grounds for continuance.

193C—4.30(17A) Withdrawals. A party requesting a contested case proceeding may withdraw that request prior to the hearing only in accordance with board rules. Unless otherwise provided, a withdrawal shall be with prejudice.

193C—4.31(17A) Intervention.

4.31(1) Motion. A motion for leave to intervene in a contested case proceeding shall state the grounds for the proposed intervention, the position and interest of the proposed intervenor, and the possible impact of intervention on the proceeding. A proposed answer or petition in intervention shall be attached to the motion. Any party may file a response within 14 days of service of the motion to intervene unless the time period is extended or shortened by the presiding officer.

4.31(2) When filed. Motion for leave to intervene shall be filed as early in the proceeding as possible to avoid adverse impact on existing parties or the conduct of the proceeding. Unless otherwise ordered, a motion for leave to intervene shall be filed before the prehearing conference, if any, or at least 20 days before the date scheduled for hearing. Any later motion must contain a statement of good cause for the failure to file in a timely manner. Unless inequitable or unjust, an intervenor shall be bound by any agreement, arrangement, or other matter previously raised in the case. Requests by untimely intervenors for continuances which would delay the proceeding will ordinarily be denied.

4.31(3) Grounds for intervention. The movant shall demonstrate that: (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

4.31(4) *Effect of intervention.* If appropriate, the presiding officer may order consolidation of the petitions and briefs of different parties whose interests are aligned with each other and limit the number of representatives allowed to participate actively in the proceedings. A person granted leave to intervene is a party to the proceeding. The order granting intervention may restrict the issues that may be raised by the intervenor or otherwise condition the intervenor's participation in the proceeding.

193C—4.32(542B) Record of proceedings. Oral proceedings shall be recorded either by mechanical or electrical means or by certified shorthand reporters. Oral proceedings or any part thereof shall be transcribed at the request of any party with the expense of the transcription charged to the requesting party. The recording or stenographic notes of oral proceedings or the transcription thereof shall be filed with the board and maintained for at least five years from the date of decision. Any party to a proceeding may record, at the party's own expense, stenographically or electronically, any portion or all of the proceedings.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

193C—4.33(542B) Hearings.

4.33(1) A hearing shall be conducted before the board or before a three-member hearing panel appointed by the board chairperson in accordance with Iowa Code section 272C.6(1). An administrative law judge may sit with the board or hearing panel to conduct the hearing. The administrative law judge shall be in control of the proceedings and shall have the power to administer oaths, to admit or execute testimony or other evidence, and to rule on all motions and objections.

4.33(2) When, in the opinion of a majority of the board, it is desirable to obtain specialists within an area of practice of the profession when holding disciplinary hearings, the board may appoint a panel of not less than three specialists not having a conflict of interest to make findings of fact and to report to the board. The findings shall not include any recommendation for or against licensee discipline.

4.33(3) The presiding officer and board members have the right to conduct a direct examination at the outset of a witness's testimony or at a later stage thereof. Direct examination and cross-examination by board members are subject to objections properly raised in accordance with the rules of evidence.

4.33(4) The hearing shall be open to the public unless the licensee or the licensee's attorney requests that the hearing be closed to the public.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

193C—4.34(542B) Order of proceedings. Before testimony is presented, the record shall show the identity of any board members present, hearing panel, or administrative law judge, and the identity of the primary parties and their representatives, and the fact that all testimony is being recorded.

Hearings shall generally follow the order established by these rules, subject to modification at the discretion of the board or of the panel of the board conducting the proceedings.

1. The presiding officer or designee shall read the specification of charges and the answer thereto, or other responsive pleading, filed by the respondent prior to the hearing. The respondent may waive the reading of the specification of charges.

2. The state's counsel representing the public interest before the board shall make an opening statement.

3. The respondent or respondents shall each be offered the opportunity to make an opening statement. A respondent may elect to reserve an opening statement until just prior to the presentation of evidence by the respondent.

4. The presentation of evidence on behalf of the state.
5. The presentation of evidence on behalf of the respondent(s).
6. Rebuttal evidence on behalf of the state.
7. Rebuttal evidence on behalf of the respondent(s).
8. Closing arguments first on behalf of the state, then on behalf of the respondent, and then on behalf of the state.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

193C—4.35(542B) Rules of evidence—documentary evidence—official notice.

4.35(1) The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

4.35(2) Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

4.35(3) Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

4.35(4) The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given the opportunity to compare the copy with the original, if available. Copies of documents shall be provided to opposing parties. Copies may also be furnished to members of the board.

All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

4.35(5) Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. Such an objection shall be accompanied by a brief statement of the grounds upon which it is based. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision. Motions and offers to amend the pleadings may also be made at hearing and shall be noted in the record together with the rulings thereon.

4.35(6) Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

4.35(7) Subject to the above requirements, if a witness is unavailable, and if a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be submitted in verified written form with both parties' consent.

4.35(8) Official notice may be taken of all facts of which judicial notice may be taken.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

193C—4.36(542B) Decisions. When five or more members of the board preside over the reception of the evidence at the hearing, their decision is a final decision if that decision receives the affirmative vote of five or more members of the board.

4.36(1) When a panel of three specialists presides over the reception of the evidence at the hearing, a transcript of the proceedings, together with exhibits presented and the findings of fact of the panel, shall be considered by the board at the earliest practicable time. The respondent or the respondent's attorney, upon notice prescribed by the board, shall have the opportunity to appear personally to present the respondent's position and arguments to the board. The decision of the board is a final decision.

4.36(2) When the hearing is conducted by a three-member panel of the board, their decision is a proposed decision and subject to the review provisions of rule 4.41(542B).

4.36(3) A proposed or final decision shall be in writing and shall consist of the following parts:

- a. A concise statement of the facts as presented by the parties.
- b. Findings of fact.
- c. Conclusions of law which shall be supported by cited authority or reasoned opinion.
- d. The decision or order which sets forth the action to be taken or the disposition of the case.

4.36(4) The decision may include one or more of the following:

- a. Exoneration of respondent.
- b. Revocation of license.
- c. Suspension of license until further order of the board or for a specified period.
- d. Nonrenewal of license.
- e. Prohibition, until further order of the board or for a specific period, of engaging in specified procedures, methods or acts.
- f. Probation.
- g. Requirement of additional education or training.
- h. Requirement of reexamination.
- i. Issuance of a reprimand.
- j. Imposition of civil penalties.
- k. Issuance of citation and warning.
- l. Other sanctions allowed by law as may be appropriate.

4.36(5) In addition to other disciplinary options, the board may assess civil penalties of up to \$1000 per violation against licensees who violate any provision of rule 4.3(542B). Factors the board may consider when determining whether and in what amount to assess civil penalties include:

- a. Whether other forms of discipline are being imposed for the same violation.
- b. Whether the amount imposed will be a substantial economic deterrent to the violation.
- c. The circumstances leading to the violation.
- d. The severity of the violation and the risk of harm to the public.
- e. The economic benefits gained by the licensee as a result of the violation.
- f. The interest of the public.
- g. Evidence of reform or remedial action.
- h. Time elapsed since the violation occurred.
- i. Whether the violation is a repeat offense following a prior cautionary letter, disciplinary order, or other notice of the nature of the infraction.
- j. The clarity of the issue involved.
- k. Whether the violation was willful and intentional.
- l. Whether the licensee acted in bad faith.
- m. The extent to which the licensee cooperated with the board.
- n. Whether the licensee practiced professional engineering or land surveying with a lapsed, inactive, suspended or revoked license.

This rule is intended to implement Iowa Code sections 542B.21, 542B.22 and 272C.6.

193C—4.37(17A) Default.

4.37(1) If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

4.37(2) Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

4.37(3) Default decisions or decisions rendered on the merits after a party has failed to appear or participate in a contested case proceeding become final board action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or an appeal of a decision on the merits is timely initiated within the time provided by rule 4.41(17A). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

4.37(4) The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

4.37(5) Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion, if a request to do so is included in that party's response.

4.37(6) "Good cause" for purposes of this rule shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 236.

4.37(7) A decision denying a motion to vacate is subject to further appeal within the time limit allowed for further appeal of a decision on the merits in the contested case proceeding. A decision granting a motion to vacate is subject to interlocutory appeal by the adverse party pursuant to rule 4.40(17A).

4.37(8) If a motion to vacate is granted and no timely interlocutory appeal has been taken, the presiding officer shall issue another notice of hearing and the contested case shall proceed accordingly.

4.37(9) A default decision may award any relief consistent with the request for relief made in the petition and embraced in its issues.

4.37(10) A default decision may provide either that the default decision is to be stayed pending a timely motion to vacate or that the default decision is to take effect immediately, subject to a request for stay under rule 4.43(17A).

193C—4.38(17A) Ex parte communication.

4.38(1) Prohibited communications. Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing, there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the board or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 4.21(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

4.38(2) Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

4.38(3) Written, oral or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

4.38(4) To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 4.24(17A) and may be supplemented by telephone, facsimile, electronic mail or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

4.38(5) Persons who jointly act as presiding officer in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

4.38(6) The executive officer or other persons may be present in deliberations or otherwise advise the presiding officer without notice or opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 4.38(1).

4.38(7) Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible, and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 4.29(17A).